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The Rights and Liabilities of Parties to Auction Sales

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That an accurate conception of the subject of Auction Sales may be had, and a clear idea obtained of the questions to be investigated and dwelt upon it is essential to at once determine within as great a degree of accuracy as possible What is an Auction Sale? and to do this in the logical order a brief sketch of the history is undertaken.

The practice is said to have originated with the Romans who applied the word "auctio" (an increase or augmentation) to sales of this character, and the meaning is clearly distinguishable in the method of proceeding with such sales to-day. The practice of successively increasing the bids until the article is sold has suffered no change by the lapse of time. Other kinds of Auctions have sprung up since its beginning and have become recognised practices, such for instance is the Dutch auction in which the Roman order of sale is reversed and the Auctioneer successively lowers his price until it is accepted by the purchaser.

Again when a sale takes place by writing the amount one will bid on a slip of paper and enclosing it in an envelope, all of which are to be opened at the same time, and the highest bidder to be named as the purchaser. Such methods have also been held to be Auctions. In fact any sale in which goods or lands are offered at public sale to be purchased by the highest bidder constitutes an Auction Sale, but a sale of goods at which the vendor announces that he will sell only at his regular price, although the method and form of presenting the goods is by a public outcry, and in all other ways similar to the usual Auction sale, it is not held to be such, and the learned Judge in his opinion cogently presents the distinction that there was a total lack of competition always essential to constitute such a sale, and he adds that at Auctions the bidders fix by competition the price at which the offered property is sold. *Cranfall vs. State of Ohio*, 28 Ohio ST. REP. 479

However if the vendor puts up goods at a certain fixed price, and no one accepting at such price he reduces it to induce an acceptance, it will clearly be an Auction. Village of Deposit vs. Pitts 18 Hun. 475. Likewise a public sale of property by a Constable or Sheriff for the purpose of satisfying an execution or other direction of the Court is an Auction Sale except as modified by statute.

Having determined what an Auction is the next consideration is of the Auctioneer. Mechem who has incorporated into his definition ideas from Story and Bishop says he is one whose business is to sell or dispose of property, rights or privileges at public competitive sale to the person offering or accepting the terms most favorable to the owner. In most states a license is required of those who conduct Auction Sales, and also bonds to protect purchasers, but the mere fact that an Auctioneer is not licensed according to the statutes will not vitiate the sale made to an innocent purchaser, 10 Met. 17.

and a note given for goods bought at public Auction is valid though the Auctioneer sold without a license as required by statute. 27 Minn. 440.

This seems to be the extreme statement of the doctrine and although the sale will be upheld where the purchasers are innocent, yet the Auctioneer is clearly liable for a penalty under the statutes.

He is the Special agent of the vendor for the purpose of the sale and has such authority as is delegated to him. It may be conferred by formal writing, or by parole or its existence may be implied from conduct. No formal act is necessary and in the absence of statute parole authority is sufficient even in the sale of real estate. Walker vs. Herring 8 Am. Rep. 616. Upon a sale of real estate upon parole authority the purchaser can invoke the aid of a Court of Equity for the specific performance of such contract. Doty vs. Wilder 60 Am. Dec. 756. The principle of all the cases is, that the Auctioneer at the sale is the agent of both parties, that

the purchaser by the act of bidding calls on him or his clerk to put down his name as the purchaser and acquiesces in such signing, and that the seller by the Auctioneer as his agent presents the property for sale and acquiesces in the acceptance and signing when the memorandum is signed. The authority of the Auctioneer like that of other agents is always revocable before sale unless coupled with an interest or where the intervening rights of third parties would suffer by a revocation.

Much implied authority of the Auctioneer is authorized by the Courts, as where one sends goods to an Auctioneer's rooms without any instructions, there is an implied authority to sell them in the ordinary course of his business and return the proceeds. *Pickering vs. Bush* 15 East. 38
Morgan vs. Darrogh 30 Texas 171. This rule of implied authority is however so greatly modified by custom that it can not be laid down as absolute, and the particular circumstances and relations of

of the parties must be diligently scrutinized.

If the possession of the property is entrusted to the Auctioneer he is entitled in the absence of other directions to receive payment for it when sold and a payment made to an Auctioneer by a purchaser in the absence of circumstances and without notice or knowledge that the vendor intended payment to be made to himself, will be held a good payment and a discharge from indebtedness to the vendor, but the duty is always with great burden resting upon the Auctioneer to act in strict conformity to the terms of the sale and any variation or change ^{subject} of it would ^{subject} him to the mercy of his principal.

114 Mass. 71.

He is also bound to give his personal attention and ability to the performance of the sale. He can not delegate the authority conferred upon him except perhaps in certain merely ministerial acts where no personal judgment or wisdom is possible to be exercised. 19 Pickering 482.

Whether or not the Auctioneer has any right to bid for a third party or even to make a bona-fide bidding for himself when it is done fairly and in good faith, has been a question which the Courts have been at some variance upon.

That he must not sell to a firm or even a company of which he is a member seems to be well settled,

Swires vs. Brotherline 41 Pa. St. 135

and if this doctrine can be upheld, how dim must be the light of a Judge who could intimate that he might sell to himself, but in 36 Texas 157 it was stated that the Auctioneer may bid himself for a third party and in Campbell vs. Swan 48 Barb. 109 a similar question was put forward by the Judge as being a query, but other decisions seem upon firm and cogent reasoning to be emphatically opposed to, any such doctrine.

In Brock vs. Rice 27 Gratt 812 Judge Staples said "It is impossible with good faith to combine the inconsistent capacities of seller and buyer, crier

and bidder in one and the same transactions.

If the Auctioneer undertakes to become the purchaser for himself or for another, his interest and duty alike prompt him to obtain the property upon the most advantageous terms." There is an irreconcilable conflict between the two positions. Verily a man can not serve two masters. It is as patent an inconsistency as that charged by Macaulay of Bacon in accepting valuable gifts from those upon whom he was soon to pass pecuniary judgment.

There is no doctrine better established than that an Auctioneer has no implied authority to warrant the goods he sells. Warrants must come from the vendor or the agent must have express authority to give such conditions to the sale.

The doctrine of warranty does not limit however the implied warranties which the law will or may create in every sale of property. 9 Wheaton. 645 In furtherance of this doctrine it may be said that an Auctioneer may be held personally liable

by the vendee for any warranty which he may make when beyond the scope of his authority.

3 Bush. 174

50 Mo. 375.

The general rules governing warranty apply here and a mere expression of opinion or bare affirmation of a fact without the intent that it shall be relied upon (when it does not mislead the purchaser) will not be held to be a warranty.

McGraw vs. Forsythe. 31 Iowa 179.

Woodward vs. City of Boston. 115 Mass. 81

In the case of personal property sold by an Auctioneer he has the right to maintain an action to recover the purchase price of the goods, or for the recovery of the goods if the condition be not complied with.

Minturn vs. Maine 7 N.Y. at page 224.

This rule is supported by two lines of reasoning
1st. That he has a special property in the proceeds of the sale for his commission and expenses and were

he prevented from bringing the action would thereby be deprived of his lien. This idea of his special property in the goods is also augmented by the fact that he is bound not to accept any bids but from responsible and solvent persons (*Den vs. Zellers* 7 N.J.L. 153, *Hobbs vs. Beavers* 2 Ind. 142, *Kinney vs. Showdy* 1 Hill 544.) and the law holds him liable to the principal for the price of the goods if by his acts he works a loss to his principal. Thus in doing justice the law can not impose liabilities upon one and at the same time deprive him of his remedies to obtain justice.

2 nd . That the purchaser is estopped from denying the right of the Auctioneer to sue by accepting the goods from him, giving him receipts for the goods and considering as the vender.

In the case of real property the rule is undoubtedly different, unless by the terms of the sale the price is made payable to the Auctioneer. If the power of sale of real estate and authority

to sign deed is given to the Auctioneer under seal he may undoubtedly maintain the action for the price in his own name .

An Auctioneer by presenting himself to the public as such implies that he has the necessary knowledge and skill to perform the duties that are incumbent upon one in such work. He is therefore bound to exercise a reasonable degree of skill and diligence in receiving bids and conducting the sale so as to secure the benefit of it to his employer, and if he fails in this he is liable for any injury occasioned thereby What may constitute negligence in some cases would not in others, and it has been held in *Hicks vs. Minturn* 19 Wend. 550 that he was not liable for failure to know and comply with a statute very recently passed. However such an act of ignorance on the part of an Atty. and Counselor has been held to be negligence and damages recovered for injury occasioned thereby.

In the absence of any express agreement that the Auctioneer shall be responsible for all damages

to the property while in his care he is not liable for more than ordinary and reasonable care.

If he agrees to insure and fails to do so he thereby becomes the insurer himself.

Granfeldt vs. Fleisker 73 Ill. 404

The deposit of the property with him is for the purpose of the sale, and the consideration which he receives for taking and holding such property is the commission, therefore in general terms his liability for property entrusted to his care for sale is that of a bailee for hire, and subject to the laws of that relation as above stated.

The mere fact that a person is selling property as an Auctioneer, is not a sufficient declaration of agency to relieve him from personal liability

Mills Vs. Hunt 20 Wend. 433.

Schell Vs. Stephens 50 Mo. 379.

if he does not at the time of the sale disclose his principal. He is bound therefore to disclose his principal and a failure to do so will make him in the eyes of the buyer, the vendor, if he so desires to elect,

The policy of the law as expressed in many of the statutes by requiring duly authorized Auctioneers to give bonds for the faithful performance of their duties has been admirably supported by the Courts. Thus it has been repeatedly held that an Auctioneer who sells stolen goods is liable to the true owner for conversion although he acted in good faith and received the property in the usual course of his trade.

Hoffman vs. Carow 22 Wend. 285

Dudley vs. Hawley 40 Barb. 394

In England if the goods were sold in "market overt" title vested in the purchaser and could not be defeated except by the true owner following and convicting the thief. Thus in many cases it was held that the property passed and the Auctioneer was not liable although the property was stolen, but it must be remembered that this was the law of a statute and did not apply to sales outside of "market overt" as Blackstone says (2 Black. Comm. 449) " If my

goods are stolen from me and and sold out of market overt my property is not altered and I may take them wherever I may find them". In the United States the "market overt "is not recognised and consequently the English exception to the law does not exist.

It has been held in many cases and the doctrine remains comparatively unshaken that where an Auctioneer who receives property for sale from one not having authority to sell it (although not stolen goods) and proceeds to sell it and to pay over the proceeds after notice of the rights of the true owner and without his authority will be held liable as for a conversion.

Saltus vs. Everett 20 Wend. 267 (never overruled and applied upwards of fifteen times in N.Y. state)

A remarkably interesting case arose in the English Courts as to the liability of an Auctioneer for not holding the sale as advertised. The action was brought by one to recover his expenses, who came from a distance to purchase the goods, and at the time of the sale the goods were withdrawn.

Harris vs. Nickerson 5 Moak 238.

The Court held that the Auctioneer was not liable saying "that it was an attempt to make a mere declaration of intention a binding contract."

At first thought this does not seem good law. The offer made by advertisement of the Auction was not indefinite for want of parties, as from the very nature of an Auction sale it is to the public. The person going to purchase apparently accepts the offer and the consideration for such acceptance is the detriment to him by loss of his expenses. Why is there not a valid contract? but upon more careful thought we find a physically slight yet legally all important act omitted.

This is the overt act by which the acceptor puts out of his power the right to retract his acceptance. This he did not do, and the true question to ask to make the case very clear would be, Could he be held liable to the Auctioneer if he refused to bid if the goods were put up for sale?

"The true explanation of the rule is that at Common Law the obligation arises not from the meeting of minds but from the fulfilment of the terms prescribed by the promisor"

Hare on Contracts p. 359

The rule no doubt works some hardships to purchasers by allowing goods to be withdrawn upon such short notice and it is perhaps a badge of fraud upon the vendor to make such withdrawals but the remedy must be by statute.

AUCTION SALES AS AFFECTED BY THE STATUTE OF FRAUDS

It was not the object of this statute to impose any new penalties for fraud and perjury, but to exclude in certain cases oral evidence to establish facts, and substitute for it written evidence. Experience had shown the English judges that corruption in this line was peculiarly liable, and a premium was virtually put upon perjury. This led to the adoption of the statute which has been reenacted in most of the United States with slight modifications. In some of the states the legislature in their attempts to make the law clear, expressly declared that Auctioneers their clerks and agents shall have power to bind both seller and buyer of property by their memorandum (Alabama and California) and in the other states the Courts have very readily adopted the law that in the absence of such a clause such rights exist.

Episcopal Church vs. Wiley 30 Am. Dec. 386.

Doty vs. Wilder 15 Ill. 410.

An exception at one time existed as to real estate holding that the Auctioneer had no such authority but it was overruled in Coles vs. Trecothic which has been followed ever since.

Thus the serious question at once appears which has been the subject of discussion in the Courts without cessation since the time of the statute, What is a sufficient memorandum? There are no fixed or arbitrary legal forms to be followed regarding the form or sufficiency of the memorandum, but in general it must be such a memorandum as will make known the terms of the contract with reasonable certainty without any recourse to parole proof.

Bailey vs. Ogden 3 John. 399

Thus the names of the parties and the subject matter, the provisions or promises on both sides and the consideration should be clearly stated.

In the ordinary course of an Auctioneers business blanks are generally used which set forth all of these essentials and however brief the statement

may be, it is yet sufficient if the contract may be, with reasonable clearness, ascertained from the memorandum. To the above statement there are numerous exceptions arising out of the slight differences in the statutes, as in the statute of Virginia it declares that "the promise or agreement must be in writing " thus it was held that the consideration need not be in writing and in other states it is held sufficient if it can be collected from the memorandum that there was a consideration.

Rogers vs. Kneeland 10 Wend. 219.

The memorandum may be made not only by the parties but by any "agent thereunto lawfully authorized". The rule that the Auctioneer upon the descent of the hammer becomes the agent of the purchaser therefore allows him to sign the memorandum for the purchaser, and the Courts have also held that the clerk of the Auctioneer may also sign the name of the purchaser, and make it binding since it is merely a ministerial act and done under the direction of the parties.

See Trustees of First Baptist Church of Ithaca vs.
Bigelow 16 Wend. 28.

Harmony exists among the Courts to a considerable degree, that the memorandum must be made and signed contemporaneously with the sale based upon the reason that it is unsafe to depend upon the memory of persons as to the exact terms of the sale .

McComb vs. Wright 4 John. Ch. 659.

Yet an Auctioneers memorandum entered in his book as early as possible after sale, from a pencil memorandum on a loose slip of paper made at the moment of the sale, is sufficient and to be regarded as the original entry. Episcopal Church vs. Wiley supra.

Price vs. Durin 56 Barb. 647.

It is also essential to note that the Auctioneer , in order that he may bind the parties by signing the memorandum must be a totally disinterested party in the subject matter of the sale.

The great mischief intended to be prevented by the statute would still exist, if one party to a contract could make a memorandum of it which would absolutely bind the other, and indeed it would even work a severe hardship to the vendee, when it was intended to be a shelter against fraud, by prohibiting him from proving by parole evidence that the written terms were not the real terms of the contract.

Thus it was held that a guardian who acted as Auctioneer to sell the property of his ward could not bind the purchaser by signing the memorandum.

Bent vs. Cobb 69 Am. Dec. 295.

However the difficulty is easily avoided by having the memorandum made by the clerk of the Auctioneer. This will bind the parties although the Auctioneer may be himself the principal.

In Bird vs. Boulter 4 Barn. & Adol. 443 it is said that " the clerk is not identified with the Auctioneer and in the business which he performs of entering the names of the parties and the terms of the sale he is impliedly authorized by the persons attending the sale to be their agent".